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No. - .

# In the Supreme Court of the United States.

OCTOBER TERM, 1980.

ARTHUR A. ALLEN, PETER A. DIFFENDERFER, KEVIN T. KERR, WILLIAM P. KOLANDER, DEREK S. SHERMAN, SPENCER C. SHERMAN, AND GARY L. THERIAQUE,

PETITIONERS,

*v.*

UNITED STATES OF AMERICA,

RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

JOSEPH S. OTERI
MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109.
(617) 227-3700
*Attorneys for Petitioners Peter A. Diffenderfer, Kevin T. Kerr, Derek S. Sherman, Spencer C. Sherman and Gary L. Theriaque*
DAVID L. SLADER,
555 Oregon National Building,
610 S.W. Alder,
Portland, Oregon 97205.
(503) 248-0731
*Attorney for Petitioner Arthur A. Allen*
DANIEL A. BACON,
Del Webb Building,
Suite 606,
2220 Tulare Street,
Fresno, California 93721.
(209) 268-8531
*Attorney for Petitioner William P. Kolander*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Question Presented.

Whether law enforcement use of technologically sophisticated vision-enhancing devices to conduct intensive, extensive surveillance of the interior areas of secluded, private property, manifesting every indicia of privacy short of enclosure within an opaque bubble, constitutes a search within the meaning of the Fourth Amendment, where it was only the use of those intrusive instruments that enabled the officers to make information-producing observations that could not have been made by the unassisted eye from any vantage point outside the property?*

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*In addition to petitioners, Gerald E. Maggiacomo was initially a party to the proceedings below. His appeal was dismissed pursuant to his motion prior to the court's decision.

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for the Ninth Circuit.**

Arthur A. Allen, Peter A. Diffenderfer, Kevin T. Kerr, William P. Kolander, Derek S. Sherman, Spencer C. Sherman and Gary L. Theriaque petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in this case on November 5, 1980 and April 16, 1981.

## Introductory Statement.

Does the future course of the Fourth Amendment lie in a steady recession in the face of advancing technology until it vanishes in an Orwellian sea of sophisticated surveillance devices capable of intruding into any place at any time? Or will it continue to be construed "to safeguard fundamental values which . . . far outlast the specific abuses which gave it birth" (*United States* v. *Chadwick*, 433 U.S. 1, 9 (1977))? The choice — and the fate of the Fourth Amendment — is the critical issue presented in this petition.

"Suspecting" that secluded private coastal property — bearing every possible indicia of an effort to maintain privacy short of enclosing its 200 acres within an opaque bubble — might be the site of an attempt to import marijuana, law enforcement officers photographed its interior with cameras equipped with telephoto lenses during aerial surveillance flights and conducted prolonged (more than three weeks), extensive (up to 24 hours/day) surveillance with night scopes, night goggles and spotting scopes from a vantage point in the hills 1½-2 miles away. All of these activities were initiated without warrants and without a factual predicate rising to the level of reasonable suspicion, much less probable cause.

Faced with the conflict between an individual's efforts to maintain his privacy and criminal investigative use of intrusive, sophisticated sense-enhancing devices capable of obviating that privacy without physical intrusion, the court below avoided the complex unresolved problems in establishing and applying standards for determining when the use of such devices to obtain and record information, otherwise unobtainable through observations by the unassisted eye from any point outside the property, is an intrusion proscribed by the Fourth Amendment as constitutionally "unreasonable." Relying primarily on the technological availability of sense-enhancing

devices capable of routinely penetrating virtually any unenclosed area from above, the routine Coast Guard aerial presence in the area, and a conclusion that petitioners should have expected the officers to use readily available intrusive devices from the air, the court held that the intrusions did not violate a "reasonable expectation of privacy" in regard to the places, objects and activities monitored and recorded. Without violation of a reasonable expectation of privacy, the intrusions were not "searches" subject to any constitutional regulation. Accordingly the court did not reach the question of whether they were constitutionally "unreasonable."

This ill-conceived analysis eviscerates the independence of the Fourth Amendment, leaving the scope of its protection of individual privacy to the virtually unfettered discretion of the government, constrained only by the limits of technology and any self-imposed restrictions it voluntarily deems appropriate. The spectre of unregulated monitoring and recording of the most intimate private activities by an omniscient, omnipresent "big brother," now only within the realm of science fiction, can become a reality when scientific and technological advances produce sense-enhancing — indeed, sense-replacing — devices able to penetrate the densest opaque material and monitor and record activities and objects within any fully enclosed structure, from any exterior location, with or without light.

Applying the rationale employed below, once such devices are readily available and the government is routinely in a position to use them, an individual who should be aware of this availability and potential has no reasonable expectation of privacy from their unregulated use. Accordingly, their use does not constitute a search within the meaning of the Fourth Amendment and the government need not justify its actions as constitutionally "reasonable." It is free to ignore any barriers placed in its path and to intrude anywhere at will, including the heretofore inviolate innermost recesses of the home.

In disavowing the imposition of any objective limitations on unregulated government intrusions without regard for the technological feasibility of transgressing such established limits, the decision below overrules, *sub silentio*, this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), and conflicts with the well established analysis guiding this Court's interpretation of the Fourth Amendment. Its flawed analysis must be rejected now if, in the future, privacy is not to become merely an extinct remembrance of the past.

## Opinions Below.

On March 28, 1978, petitioners were charged in a superseding indictment with various marijuana-related offenses in the United States District Court for the District of Oregon, arising from the December 31, 1977 seizures of a large quantity of marijuana from secluded, private coastal property and on the ocean. After lengthy pre-trial hearings, petitioners' motions to suppress were denied in a perfunctory order, issued without findings of fact or conclusions of law. The case was subsequently transferred to the Northern District of California. Following a jury-waived trial before Judge Samuel Conti, petitioners were found guilty and sentenced as set forth below in n.*. Their convictions were affirmed by the United States

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* All petitioners were convicted of conspiracy to possess with intent to distribute marijuana (count 1) and possession with intent to distribute marijuana (count 3), in violation of 21 U.S.C. §§ 841, 846, and 18 U.S.C. § 2 — with the exception of petitioner Kolander who was convicted on count 3 only. Petitioner Allen was also convicted of conspiracy to import marijuana in violation of 21 U.S.C. §§ 960, 963 (count 2).

Allen was sentenced to 5 years incarceration with a special parole term of 5 years on each count, with the sentences on counts 1 and 3 to be served con-

Court of Appeals for the Ninth Circuit on November 5, 1980. The court's opinion is reported at 633 F.2d. 1282, and reproduced in the Appendix at pp. 1a-21a. In an order of April 16, 1981, the court denied a petition for rehearing and suggestion for rehearing en banc and amended certain paragraphs of its original opinion. The order, not yet officially reported, is reproduced in the Appendix at pp. 22a-24a.

## Jurisdiction.

The original judgment of the Court of Appeals was entered on November 5, 1980. A petition for rehearing and suggestion for rehearing en banc was denied on April 16, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## Constitutional Provision Involved.

The Fourth Amendment to the United States Constitution provides:

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secutively, and the sentence on count 2 to be served concurrent with that of count 1.

Derek Sherman was sentenced to consecutive terms of 5 years incarceration with a special parole term of 5 years on counts 1 and 3.

Diffenderfer was sentenced to consecutive term of 4 years incarceration with a special parole term of 5 years on counts 1 and 3.

Kerr was sentenced to consecutive terms of 5 years incarceration with a special parole term of 5 years on counts 1 and 3.

Theriaque was sentenced to consecutive terms of 3 years incarceration with a special parole term of 5 years on counts 1 and 3.

Spencer Sherman was sentenced to consecutive terms of 3 years incarceration with a special parole term of 3 years (count 1) and 2 years incarceration with a special parole term of 3 years (count 3).

Kolander was sentenced to a term of 4 years incarceration with a special parole term of 2 years on count 3.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Statement of the Case.*

In the summer of 1977, petitioner Arthur Allen purchased 200 acres of coastal property (referred to as the Allen ranch) near Coos Bay, Oregon. It ran parallel to the ocean, but was separated from it by a narrow strip of federal property administered by the Bureau of Land Management (BLM) (A. 2a). The ranch was private and secluded: fenced, surrounded by thick underbrush, and located in a valley rendering the interior of the property not visible to the unassisted eye, even from a vantage point in the hills to the east (A. 2a-3a; Tr. 103, 105, 367-369). To further enhance its privacy, Allen put up a gate across the main access road to the ranch, posted "No Trespassing" signs around its perimeter, and, unlike the prior owner, refused to permit local fishermen and hunters to cross the ranch to reach the BLM land on the ocean side (A. 2a).

On November 6, 1977, the U.S. Customs Bureau opened a new office in Coos Bay. Shortly thereafter, the officer in charge, Larry Gano, began an investigation of Allen — in-

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* The district court made no findings of fact in denying petitioners' motions to suppress. Petitioners submit that the facts set forth in the opinion and amendments of the Court of Appeals are not complete. Accordingly, this statement of facts is based on the transcript of the suppression hearing, referred to as "Tr.," as well.

spired by complaints of non-access from local residents (*id.*). However, Gano had suspicions of marijuana importation from the outset, which he communicated to the local sherriff's office and the Drug Enforcement Administration (DEA) between November 6-21, 1977 (Tr. 26, 27, 109-110).*

On November 22, 1977, Gano arranged with the Coast Guard for a helicopter overflight of the ranch** in order to observe and photograph what he could not see from outside the property (A. 2a; Tr. 16, 30, 112, 114). During the flight on December 5, he took photographs with a camera equipped with a telephoto lens. When blown up, they disclosed a new extension on the barn and large wide tracks to and from the barn (A. 2a-3a).

As a result of these observations, Gano intensified his investigation on the following day by accompanying two BLM officers seeking an easement across the property to the Allen ranch. He did not disclose his identity (A. 3a). Gano's purpose was concededly criminal investigative — to search for evidence, decide if his investigation should be intensified, and assess the feasibility of perimeter surveillance (Tr. 123-125, 128).

His suspicion increased by his observations (A. 3a), Gano implanted seismic sensors (devices permitting the monitoring of vehicular traffic from a distance (*id.*)) in and around the ranch two days later. On that date he also instituted nearly constant surveillance of the ocean, beach, and interior portions of the ranch by officers situated in the hills approximately 1½-2 miles east of the ranch and using vision-enhancing

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* His investigation during that period revealed only that Allen had no criminal record, had a California driver's license and address, and drove a car registered in California to another individual (Tr. 105, 106, 113-115).

** The Coast Guard routinely flew over or near private coastal property on training flights and for other purposes.

devices — including night vision scopes and goggles as well as spotting scopes (A. 3a; Tr. 44-45, 169-170).

Increased vehicular activity was observed on the night of December 18 (A. 3a-4a); the next day Gano met with the sheriff and Coast Guard officials to develop a contingency plan to interdict the suspected marijuana importation (A. 4a).

On December 21, Gano made a second helicopter-photography overflight. Although he observed a van on the ranch with binoculars, it was not until the photographs were developed and blown up that he saw a semi-trailer parked beneath the trees (A. 4a; Tr. 54-55). As a result of that observation, surveillance was stepped up to 24 hours/day and the sheriff's office and Coast Guard were put on alert (A. 4a; Tr. 181-182). A third flyover, without photography, was conducted on December 24 (Tr. 182, 934).

On December 29, at approximately 10:00 P.M., the surveillance team saw lights flashing in the ocean and the silhouette of an unlighted vessel just offshore (A. 4a). An hour later Gano alerted the Coast Guard and sheriff's office to activate the pre-arranged plan (A. 4a), and, shortly before midnight, the assembled officers were divided into two teams — a beach team to enter from the parking lot on the beach side of the ranch, the other to wait outside the inland gate (Tr. 63-65, 199). Before the instructions could be followed, the boat was observed drifting off (Tr. 65-66). Nonetheless, pursuant to Gano's instructions, the beach team entered and conducted a two-hour search of the parking lot (A. 4a).* Assuming that an offload would be attempted the following night, Gano directed all personnel to regroup then (A. 4a).

The beach team reentered the Allen parking lot by 9:30 P.M. on December 30 (Tr. 209-210). At approximately 10:30 P.M.,

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* They found fresh orange peels and suspected amphibious vehicle tracks, and smelled the odor of diesel fuel (Tr. 204-205, 340-342, 382).

a vessel without lights was observed just offshore by the surveillance team in the hills (A. 4a). At 1:00 A.M., the beach team observed an amphibious vehicle on the beach; it entered the water and proceeded to the ship shortly thereafter (id.).

Convinced that a full-scale search would occur later (Tr. 219-220), Gano went to a private residence to telephone the Coast Guard and effectuate the contingency plan. He also telephoned the DEA (A. 4a; Tr. 216).

After the first amphibious vehicle returned to shore at 3:00 A.M., the beach team heard the sound of boxes being unloaded and people congratulating each other (A. 4a-5a). When the vehicles returned from a second trip to the vessel at 4:45 A.M., a flare was ignited, signalling the start of the operation: helicopters moved in with their "night sun" search lights; teams of officers swarmed all over the property (A. 5a; Tr. 907). The people on the beach scattered. The parking lot — containing the two amphibious vehicles, a semi-trailer and a van (all stationary and unoccupied) — was secured (A. 5a). Although tightly sealed and in a fully guarded area, one of the metal boxes (boxes had been found in the trailer and on the amphibious vehicles and the beach) was cut open, disclosing marijuana (A 5a). The vehicle interiors and their contents were searched (A. 5a). At the same time, also pursuant to the contingency plan, the residence on the ranch was secured and searched for suspects (A. 5a). Within the next few hours a vessel was seized offshore.

On the suspicion that not all the participants had been arrested,* a law enforcement bulletin was issued shortly after the initial raid to check anybody in the vicinity of the Allen ranch who was wet/cold and without identification (A. 5a-

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*Petitioner Diffenderfer, the only person found on the parking lot, had been immediately arrested. Other suspects had been arrested in the woods and in other areas of the beach (A. 5a).

6a). Petitioners Kolander, Kerr, Allen, and Spencer Sherman were arrested during this roundup.

## Reasons Why the Writ Should Be Granted.

The Fourth Amendment safeguards "'a right of the people which is basic to a free society'" (*Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967)) —"' the privacy and security of individuals against arbitrary invasions by government officials.'" *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978). See, also, *Delaware* v. *Prouse*, 440 U.S. 648 (1979). This petition raises critical questions concerning the scope of that basic right — and its future — in a technologically sophisticated society.

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court refocused the inquiry used to determine when an intrusion is a search subject to constitutional regulation. Holding that the electronic interception and recording of telephone conversations made from a public phone booth, without physical intrusion into the booth, constituted a search subject to regulation by the Fourth Amendment, it rejected the requirement of a physical intrusion into a particular enclosure designated a "constitutionally protected area." A search was defined as a government intrusion that "violated the privacy upon which [an individual] justifiably relied . . ." *Id.*, at 353.

In the last 13 years this Court has analyzed the scope and content of this "reasonable expectation of privacy" in varying contexts.* It has not yet addressed its parameters in the situa-

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*See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968) (stop and frisk on street); *Mincey* v. *Arizona*, 437 U.S. 385 (1978) (residential search/homicide investigation); *Michigan* v. *Tyler*, 436 U.S. 499 (1978) (residential search/arson investigation).

tion presented by this case — concededly "extensive" (A. 9a) warrantless surveillance of secluded private property for criminal investigative purposes conducted — without physical trespass — by means of officers equipped with sophisticated sense-enhancing devices. These surveillances included helicopter overflights during which the officer made observations with binoculars and photographed the area with a camera equipped with a telephoto lens. As recognized by the court below, not only was he unable to obtain any of the information he derived during the flights from unassisted visual surveillance from any point, either on land or at sea, but, in addition, the blown up photographs revealed information he had not obtained during his own airborne observations (A. 9a-10a). The government also conducted intensive visual surveillance of the interior areas of the property from a command post in the hills approximately 1½-2 miles away by officers equipped with night scopes, night goggles and telescopes. Again the equipment afforded observations not visible to the unassisted eye from any position outside the property.

Despite the success of the well manifested indicia of privacy in preserving the interior of the Allen ranch against intrusion from the unassisted eye's seeking to observe from any land- or sea-based vantage point outside the property, the court below held that the technologically assisted surveillances here "did not violate any reasonable expectation of privacy" (A. 9a), and, therefore, were not searches subject to the restrictions of the Fourth Amendment. The court concluded that there was no objective reasonable expectation of privacy, focusing first on the site of the surveillance as unenclosed and, therefore, like virtually all such areas today, subject to airborne surveillance utilizing the readily available photographic vision-enhancing devices produced by today's technology. It also relied on the government's routine use of helicopter flights over the area, providing a position from which to conduct these air-

borne intrusions. Finally, it found the suspicion of future unlawful activity, justifying the concentration of surveillance at that area, to be relevant.* Petitioners had no reasonable subjective expectation of privacy either. They should have known that the government routinely flew over the area. Moreover, as coastal residents, they should also have been aware that such flights involved sea coast patrol and surveillance. Accordingly, they could expect that the officers would avail themselves of sense-enhancing equipment.

The analysis failed to consider whether the Fourth Amendment protects the right to have certain expectations of privacy as well as the expectations themselves, or whether it affords a degree of protection from arbitrary government intrusions at the discretion of the officer in the field that cannot be judicially or governmentally abrogated — thereby creating an expectation of privacy that remains reasonable regardless of the availability and public awareness of intrusive devices capable of transgressing those objectively established limits.

It also ignored the degree and intensity of intrusiveness effected by the probing devices employed here. They were not simply sense-enhancing devices; rather, they served as sense-replacement instruments, replacing the officers' natural vision with a superior, artificial viewing potential providing the sole

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* Petitioners submit that the reliance on a suspicion of future unlawful activity as relevant to an assessment of the existence of a reasonable expectation of privacy is totally misplaced. While factual support for a conclusion of unlawful activity is relevant to determining whether a search is constitutionally reasonable, it bears no relationship, logical or otherwise, to the initial determination of whether an intrusion is a search within the meaning of the Fourth Amendment — a question which focuses on the existence of a reasonable expectation of privacy and not whether there is a reasonable basis for intrusion into that expectation. Moreover, reliance on this criteria conflicts with this Court's ruling in *Mincey* v. *Arizona*, 437 U.S. 385, 391 (1978), that an individual does not forfeit a reasonable expectation of privacy in a place because he has committed an offense.

predicate for the observations their natural senses were totally unable to obtain, absent physical intrusion.

Petitioners submit that in holding that the technological capability and availability of intrusive devices, law enforcement ability to readily utilize those instruments, and the individual's awareness of the existence, scope and availability of this intrusive potential* negated petitioners' reasonable expectation of privacy despite their manifestly successful efforts to exclude the unaided senses from the areas surveilled, the decision below not only elevates the interest in effective law enforcement above the individual rights protected by the Amendment — in disregard of this Court's warning that "the mere fact that law enforcement may be made more efficient

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* The analysis employed below in examining the individual's subjective expectation of privacy is misdirected. First, subjective expectation is one prong of a two-part test. The question is not whether the subjective expectation is reasonable, but whether it exists; whether a person "*ha[s] exhibited* an actual (subjective) expectation of privacy . . . ." *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added). Petitioners submit that a subjective expectation was unequivocally manifest. Moreover, even if the reasonableness of a subjective expectation were relevant, the analysis below is flawed.

In holding that if an individual should be aware that his privacy can and might be invaded he can have no reasonable subjective expectation of privacy, the court has left the scope of the protections of the Fourth Amendment to the discretion of the government. By publicizing its ability and intent to intrude, the government could nullify any expectation of privacy and with it, the protections of the Fourth Amendment. Finally, the analysis also ignores this Court's recognition that an individual may retain an expectation of privacy reasonable in regard to one type of intrusion that is not reasonable in regard to another. Just as an individual may hold a reasonable expectation of privacy in regard to intrusion by government agents but not in regard to intrusion by others (*Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315-316 (1978)), so here, petitioners submit they had a reasonable expectation that the Coast Guard helicopters would not serve as platforms for telephotographic and binocular intrusions even if they could not reasonably expect that the Coast Guard would not fly over the property during its sea coast patrol.

can never by itself justify disregard of the Fourth Amendment" (*Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978)) — but, critically, employs an analysis which effectively reduces the Fourth Amendment to a nullity — essentially limiting its protection of individual privacy and security to that which the government is willing to bestow. Bounded only by the limits of technological development and the voluntary exercise of its own discretion, the government is free to ignore even the most determined efforts to maintain objects and activities private and away from prying eyes if the state of technology is known to permit it to do so.

Today, the court below limits itself to removing unenclosed areas subject to technologically feasible surveillance from those intrusions regulated by the Fourth Amendment. Although it implies that sense-enhanced invasion of a dwelling is different from such intrusion,* the validity of its distinction is

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* Petitioners submit that in light of the extensive measures taken to ensure the privacy of the unenclosed interior area of the ranch, the court below placed excessive reliance on its unenclosed nature as vitiating an expectation of privacy. It is well settled that the protections of the Fourth Amendment are not limited to the interior of a physical structure. It safeguards an individual's reasonable expectation of privacy wherever it may be — in a public phone booth (*Katz* v. *United States*, *supra*); on the street (*Terry* v. *Ohio*, *supra*); in his car (*Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)).

While this Court has stated that the protections of the Fourth Amendment do not extend to sights in the "open fields" (*Hester* v. *United States*, 265 U.S. 57 (1927)), in light of the subsequent analytical shift from sole reliance on concepts of trespass and protected areas to a focus on reasonable expectations of privacy as determinative of the scope of the Fourth Amendment (see, *e.g.*, *Katz* v. *United States*, *supra*), petitioners submit that the "open fields" doctrine can no longer be found to stand for the unadorned proposition that unless there has been an intrusion into the area traditionally defined as the "curtilege" of the home, there has been no search within the meaning of the Fourth Amendment. Today, *Hester* must be construed as meaning only that "open fields" were not traditionally areas in which individuals harbored a reasonable expectation of privacy but that a determination of the scope of the protections of the Fourth Amendment must turn on close scrutiny of all the

negated by extending the logic of its analysis. If the technological feasibility and availability of an intrusion and individual awareness of that intrusive capacity are the criteria determining whether an intrusion is subject to the strictures of the Fourth Amendment, as tomorrow's scientific and technological advances produce and make commonplace sense-enhancing/replacing instruments with well-publicized intrusive capabilities far beyond those currently available, the individual's reasonable expectation of privacy — and the type of government intrusions within the reach of the Fourth Amendment — will shrink accordingly. The final Orwellian vision will become constitutionally permissible with the development of visual and aural monitoring and recording devices with a known ability to intrude into the innermost recesses of the home without physical penetration — regardless of any measures employed to preclude such intrusion. The last traditional inner sanctum of privacy will disappear, leav-

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facts, including the locus of the search. The phrase "open fields," like the word "automobile," is not "a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 461-462. It may remain the shorthand term used when an intrusion on private property outside the traditional "curtilege" is found to be constitutionally permissible, but it can no longer mean that all such intrusions are, by definition, constitutionally permissible. See, *e.g.*, *United States ex rel. Gedko* v. *Heer*, 406 F.Supp. 609 (W.D. Wis. 1975).

Examining the facts here, petitioners submit, compels the conclusion that the secluded interior of the privately-owned Allen ranch was not a constitutionally unprotected "open field." As this Court noted in *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12 (1978), "[o]ne of the main rights attaching to property is the right to exclude others, . . . and one who owns . . . property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Since the interior here was not exposed to the technologically unassisted view of the observer outside the property, and since the ranch was fenced and posted with "No Trespassing" signs, the expectation of privacy arising from the right to exclude remains intact and the technologically-enabled intrusion into that area must be defined as a search.

ing the individual without an enclave he may reasonably expect to maintain as private — unless the government informs him that he will be permitted to do so.

Petitioners submit that it flies in the face of law, logic and policy to allow the government the discretion, bounded only by the limits of technology, to define the scope of a provision expressly intended to restrict and regulate its own actions. As a provision mandated to effectuate fundamental individual rights, the Fourth Amendment must possess, and has been construed by this Court as possessing, substantive independent content.

It is beyond dispute that in determining whether a search or seizure is "reasonable," law enforcement officers are not permitted to define the constitutionality of their own actions. The Fourth Amendment, as interpreted by this Court, imposes objective criteria by which the officer's actions are judged. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Katz* v. *United States*, *supra*; *Brown* v. *Texas*, 443 U.S. 47 (1979). As this Court stated in *United States District Court for the Eastern District of Michigan, Southern Division*, 407 U.S. 297, 317 (1972), "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."* For the same reasons, the determination as to when an intrusion is to be defined as a search cannot be left to the discretion of the investigating officer, but must be defined by objective criteria. Indeed, this Court has so held in *Katz* v. *United States*, *supra*.

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* In the context of discussing the warrant requirement, this Court has often emphasized the necessity for interposing a neutral magistrate between the officer and the citizen to provide a "more reliable safeguard against improper searches" than the judgment of the investigating officer, *United States* v. *Chadwick*, 433 U.S. 1 (1977). Again, this demonstrates that the scope of the Fourth Amendment's protections cannot be left to the discretion of the officers in the field.

This Court further held in *Katz* that the Fourth Amendment provides the right to hold certain expectations of privacy inviolate from unregulated government intrusion and establishes a degree of protection which cannot be abrogated by the technological capability to do so or individual awareness of that intrusive potential. Thus, in *Katz*, although the government undeniably possessed the technological capability of intercepting oral communications without physically invading the locations from which the communications were either initiated or received, and although this potential was public knowledge, preservation of the fundamental rights and liberties protected by the Fourth Amendment mandated the imposition of limitations on governmental use of that intrusive device. Like a traditional physical intrusion into a home, electronic interception of oral communications constituted a search within the meaning of the Fourth Amendment which must be regulated by the strictures of reasonableness and the warrant clause. See, also, *United States* v. *Taborda*, 491 F.Supp. 50, 53 (E.D. N.Y.), *vacated and remanded on other grounds*, 635 F.2d 131 (2d Cir. 1980); *Terry* v. *Ohio*, *supra* (rejecting suggestion that a "frisk" is not a "search" within the meaning of the Fourth Amendment and discussing the individual's right to expect such intrusion not to be lightly undertaken and the need for establishing standards governing police in conducting frisks).*

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*Examining the surveillance conducted here in light of the principles, policies and standards set forth by this Court in *Katz* v. *United States*, *supra*, and its progeny, petitioners submit that they present paradigmatic examples of the type of law enforcement intrusions which must be defined as "searches" within the meaning of the Fourth Amendment if the scope of its mandated protections is not to be defined solely in terms of the current state of technology.

The Allen ranch manifested all indicia of efforts to maintain the privacy of activities conducted within its interior and prevent intrusion by even a

**In ignoring the existence of this objectively established right to maintain certain expectations of privacy regardless of the technological capability for intrusion or individual awareness of that capability, and in employing an analysis that leaves the government as the final arbiter of the scope and availability of the protections of the Fourth Amendment, constrained only by the limits of technological availability, the decision below overrules, *sub silentio*, this Court's decision in *Katz* and should be reversed.***

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curious passerby. As the court below recognized, these measures were not merely symbolic — they were, in fact, effective in excluding all but the technologically enhanced eye. The subjective expectation of privacy was manifest.

Protection of this expectation is objectively reasonable. Before law enforcement officers engaged in a criminal investigation can be permitted to place an individual's activities — conducted within the confines of his own property, an area which normally gives rise to a recognized expectation of privacy (see *Rakas* v. *Illinois*, *supra*) — under intensive scrutiny ranging from 16-24 hours/day for a three-week period, and before the government can be permitted to conduct aerial surveillance using a camera equipped with a telephoto lens, it must be required to submit the facts justifying its intrusive, pervasive conduct to a neutral magistrate. An individual should have the right to assume that "big brother" cannot arbitrarily single him out and monitor his activities in the interior of his own domain.

*If, as petitioners submit, the government intrusions must be deemed searches within the meaning of the Fourth Amendment, they must be found to be classically unreasonable. The factual predicate for a finding of probable cause to search was patently absent. Nor, assuming, solely for the sake of argument, that probable cause existed, was there the slightest justification for the failure to comply with the warrant requirement at any stage of the series of warrantless searches conducted here — including the final search on December 31 when the officers invaded the property pursuant to a prearranged contingency plan.

## Conclusion.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH S. OTERI,
MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109.
(617) 227-3700
*Attorneys for Petitioners Peter A. Diffenderfer, Kevin T. Kerr, Derek S. Sherman, Spencer C. Sherman and Gary L. Theriaque*

DAVID L. SLADER,
555 Oregon National Building,
610 S.W. Alder,
Portland, Oregon 97205.
(503) 248-0731
*Attorney for Petitioner Arthur A. Allen*

DANIEL A. BACON,
Del Webb Building,
Suite 606,
2220 Tulare Street,
Fresno, California 93721.
(209) 268-8531
*Attorney for Petitioner William P. Kolander*

## Appendix A.

**UNITED STATES of America,**
**Plaintiff-Appellee,**
**v.**
**Arthur A. ALLEN, Peter A. Diffenderfer, Kevin T. Kerr, William P. Kolander, Derek S. Sherman, Spencer C. Sherman, and Gary L. Theriaque, Defendants-Appellants.**

**Nos. 79-1059, 79-1060 and 79-1063 to 79-1067.**

**United States Court of Appeals, Ninth Circuit.**

**Argued and Submitted Dec. 10, 1979.**
**Decided Nov. 5, 1980.**
**Rehearing Denied Dec. 31, 1980.**

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Martin Weinberg, Boston, Mass., Marcus S. Topel, San Francisco, Cal., argued for defendants-appellants; Oteri & Weinberg, Boston, Mass., Robert F. Collins, Troy & Collins, Dorchester, Mass., on brief.

David Smith, Crim. Div., Washington, D. C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before KENNEDY, TANG and ALARCON, Circuit Judges.

KENNEDY, Circuit Judge.

After customs interdiction of an amphibious operation to import over eight tons of marijuana, the participants were

convicted of federal offenses. These appeals followed. Appellants allege the prosecution used evidence resulting from unlawful surveillance and illegal seizures and arrests, that the evidence was insufficient, and that the sentences were improper. We reject these contentions and affirm.[1]

## I. Facts

In the summer of 1977, Arthur Allen purchased 200 acres of coastal property near Coos Bay, Oregon. The property was located in a secluded area. It came to be known as the Allen Ranch. The ranch was parallel to the ocean for about one mile, but it was separated from the beach by a narrow strip of federal property. Shortly after purchasing the property, Allen posted "No Trespassing" signs at points around the perimeter of the property and constructed a gate across the main access road to the ranch. Allen also terminated the previous owner's practice of permitting local fishermen and hunters to cross the property to reach the federal property on the ocean side.

On November 6, 1977, the United States Customs Bureau opened an office in Coos Bay. The officer in charge, Larry Gano, almost immediately became aware of complaints from local residents who had been refused permission to cross the Allen Ranch. A check on Allen's background led Gano to suspect that the ranch might be a drug-smuggling base. On December 5, 1977, Gano accompanied members of the Coast Guard on a helicopter flight past the ranch. According to the Government, the Coast Guard routinely flew over private property on the Oregon coast for training flights and other purposes, including law enforcement. Using a telephoto lens,

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[1] The related appeal of Gerald E. Maggiacomo, 79-1062 has been dismissed on motion of the appellant.

Gano took photographs of the ranch property. The photos revealed unusually wide tire tracks leading to and from a barn and a new extension built on the barn.

The next day, Gano accompanied two officials of the Bureau of Land Management (BLM) to the ranch. In response to the number of complaints they had received from fishermen and hunters, the officials sought to obtain a public easement across the ranch. As the men approached the ranch house, Allen appeared at the door and told them to leave. After one of the BLM officers identified himself and stated that they wanted to talk about obtaining a public easement across the property, Allen allowed them to approach. When Allen asked to see their identification, the BLM officials produced theirs, but Gano, not wanting to reveal his identity as a customs official, said his was at home. While on the property, Gano noticed that it was not being used as a farm and that Allen's hands were not calloused.

Because his observations increased his suspicion, Gano decided to monitor vehicular activity in and out of the property by implanting seismic sensors at the entrances. The sensors detect vibrations which vehicles cause as they pass by. According to the Government, they are capable of distinguishing people and animals from vehicles. These sensors emit a series of beeps recorded or monitored at a unit some distance away. Gano also set up a command post in the hills directly east of the Allen Ranch. While planting the sensors on federal land near the ranch, a customs officer noticed tire tracks 78 inches wide running from a river to a road which led to the ranch. The tracks were wider than those made by a dune buggy or other such vehicles. Beginning on December 8, 1977, the ocean, beach, and a small portion of the ranch were kept under nearly constant surveillance by officers using a variety of vision-enhancing devices. On the night of December 18, the officers noticed a significant increase in vehicular activity

on the ranch; although they could not actually see any vehicles, they could see the glare of moving lights.

The next day, Gano, strongly suspecting that a conspiracy to import marijuana was under way, met with the local sheriff and Coast Guard officials to develop a contingency plan for interdicting the operation. Two days later, on December 21, Gano made a second helicopter overflight. An officer looking through binoculars saw a large van and semi-trailer parked on the property. As a result of this discovery, Gano put the Sheriff's department and Coast Guard on the alert and intensified the surveillance.

At approximately 10:00 p.m. on December 29, after the surveillance team saw light signals passing between the beach and an unlighted vessel positioned just offshore, Gano alerted the Coast Guard and Sheriff's department to prepare for action pursuant to the pre-arranged plan. It soon appeared, however, that the suspected smuggling operations had been called off due to bad weather. Some of the officers, at Gano's request, then entered Allen's property and searched a graveled clearing, described as a "parking lot," on the west end of the ranch. According to the Government, the officers found nothing of any use to the investigation. Assuming that the vessel would attempt to offload the following night, Gano directed all personnel to regroup then.

At approximately 10:30 p.m. on December 30, the officers at the command post saw an unlighted vessel just offshore, near the Allen property. At approximately 11:45 p.m. a team stationed by the beach saw a flash of light from the vessel. At 1:00 a.m. the beach team saw an amphibious vehicle. Shortly thereafter it entered the water and proceeded to the ship. Gano telephoned the Coast Guard and put the contingency plan into effect.

At 3:00 a.m. the first amphibious vehicle returned to shore and the beach team overheard the sound of boxes being unload-

ed and people congratulating each other. At 4:45 a.m., when the vehicles returned from a second trip out to the vessel, the officers ignited a flare as a signal to begin the arrests. The men on the beach were ordered to freeze, but they scattered as soon as the flare went out. At the same time, the vessel was illuminated by a Coast Guard helicopter. Waiting teams of officers then swarmed the property. The beach team secured the amphibious vehicles, the van and semi-trailer parked nearby, and they looked into all the vehicles. The officers discovered boxes in the trailer, on the beach, and in the amphibious vehicles. They cut one open and found marijuana inside. The officers then inventoried the contents of the trailer and van, including unlocked luggage and attache cases. While these operations were performed on land, the ship was tracked by the use of radar and helicopters.

One of the arrestees told officers that there were a few unarmed men in the ranch house. The officers then entered the house to secure it and conducted a brief search, but found no one inside. Apparently the officers proceeded to most parts of the house. While there, the officers observed radio equipment. They so testified at trial.

At approximately 5:00 a.m. the ship, which was about eight miles offshore, was illuminated again by the Coast Guard helicopter and ordered to stop and identify itself. It identified itself as the Cigale, of Panamanian registry. The crew of the vessel was either in the process of, or then began, throwing boxes over the side. The Coast Guard later boarded the vessel, which by that time had been abandoned by its crew and was flooded with water. The Coast Guard, fearing that the Cigale would sink, seized some documents from it. The Coast Guard retrieved 174 boxes from the water, two of which had burst open revealing the contents to be marijuana.

Because it was suspected that some of the participants had fled in the darkness, a law enforcement bulletin was issued to

check anybody in the vicinity of the Allen Ranch who was wet or cold and without identification. At approximately 11:30 a.m. on December 31 (about seven hours after some suspects fled from the beach), a Coos Bay police officer saw Kolander sitting in a field a few miles from the beach. The police officer stopped to question him. The officer noticed a bulge in Kolander's pocket and that he was wet. The officer frisked him, found a pair of pliers similar to a pair seen at the Allen Ranch, and arrested him. Kerr was apprehended walking along the highway in a full skindiver's wetsuit at 5:30 p.m. that day. Spencer Sherman was arrested at 9:00 p.m. that evening while he was hitchhiking on the highway near the ranch, wearing soaking wet clothes covered with sand. Allen was arrested at 6:00 p.m. on January 2, 1978 (approximately 37 hours after the suspects fled from the beach) after he was seen coming out of the bushes into the road. Solely on the suspicion engendered by his presence in the area, a deputy sheriff ordered Allen to lie on the ground, frisked him, and handcuffed him. He was identified by the search as Arthur Allen and placed under formal arrest.

Shortly before appellants' trial was to begin, the trial judge became unavailable, and Judge Conti of the Northern District of California was designated to hold court in the district of Oregon. After the defense moved for change of venue based on pretrial publicity, Judge Conti transferred the case to his own court in the Northern District of California. All appellants were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); Allen, Diffenderfer, Kerr, Derek Sherman, Spencer Sherman, and Theriaque were convicted also of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846; Allen was convicted also of conspiracy to import marijuana, in violation of 21 U.S.C. § 963.

Appellants make numerous fourth amendment challenges to their convictions. They contend that the warrantless surveillance of the Allen Ranch prior to the full-scale interdiction operation on December 31 was a series of unlawful searches. They object to the helicopter overflights, to the use of seismic sensors and vision-enhancing devices, and to Gano's posing as a BLM official. They also contend that the enforcement operations on December 31, both on land and sea, violated the fourth amendment, and that the subsequent arrests of Kolander, Kerr, Sherman, and Allen were illegal. Appellants also challenge the sufficiency of the evidence supporting their conviction. Finally, they claim that the assignment, trial, and sentencing proceedings were prejudicial in various ways.

## II. Fourth Amendment Issues

Under *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the controlling question for most of the search issues here is whether the government agents intruded upon the defendants' reasonable expectation of privacy. Several courts have expressed concern about unregulated use by police of sophisticated electronic surveillance devices. *See, e.g., United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977)[2]; *United States* v. *Moore*, 562 F.2d 106 (1st Cir.

[2] "The three judges here concerned wish to make clear that in this age of ever-advancing sophistication in the development of electronic eavesdropping devices, they are not insensitive to unjustifiable intrusions on the right of privacy, a right that is deemed to be most precious to the American people. Law enforcement agencies should not have carte blanche power to conduct indiscriminate surveillance for unlimited periods of time of varying number of individuals. Our conclusion as to the propriety of the installation and use of the transponder in this case is predicated upon [the fact that] here the officers, prior to the installation, had been given reliable information . . . that the plane was being utilized in the pursuit of criminal activity." 562 F.2d at 1156.

1977)[3]; *United States* v. *Solis*, 536 F.2d 880 (9th Cir. 1976)[4]; *United States* v. *Cofer*, 444 F.Supp. 146, 149 (W.D. Tex. 1978)[5]; *United States* v. *Kim*, 415 F.Supp. 1252, 1255-56 (D.Haw.1976)[6]; *Phelan* v. *Superior Court*, 90 Cal.App.3d 1005, 153 Cal.Rptr. 738 (1979); *People* v. *Sneed*, 32 Cal.App. 3d 535, 108 Cal.Rptr. 146 (1973) (use of helicopter to obtain otherwise unobtainable observations of marijuana plants growing on a twenty-acre ranch "unreasonable governmental intrusion"). On the other hand, this circuit has indicated in several contexts that the police may observe people or places aided through use of a variety of tools which materially enhance or assist the senses, without first having to secure a search warrant. In *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978), for example, the court said: "Permissible

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[3]The court in *Moore* expressed concern about use of electronic beepers, and it distinguished beepers from "magnification of the observer's senses [by] use of a helicopter, binoculars, radar, or the like." 562 F.2d at 112.

[4]The court in *Solis* said:

> Aids such as flashlights or binoculars raised no great problem and at one time the line between legal observation and illegal invasion was drawn at physical trespass within a protected area. However, the use of sophisticated modern mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and a broadening of protection to cover a "reasonable expectation of privacy." This we take to be the test, to be applied to the circumstances of each case.

536 F.2d at 882 (citations omitted).

[5]"[T]he Court cannot countenance the potentially unlimited duration of this type of surveillance [electronic beepers]. Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry." 444 F.Supp. at 149.

[6]"It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search." 415 F.Supp. at 1255-56.

techniques of surveillance include more than just the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, search-lights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case." *See also United States* v. *Solis, supra*, 536 F.2d at 882 (use of trained dogs to smell marijuana inside a trailer from place twenty-five yards away and accessible to the public not a fourth amendment violation); *United States* v. *Bronstein*, 521 F.2d 459, 461-63 (2d Cir. 1975) (marijuana smelling dogs at airport); *United States* v. *Minton*, 448 F.2d 37, 38 (4th Cir. 1973) (binoculars may be used without warrant); *People* v. *Superior Court*, 37 Cal.App.3d 836, 112 Cal. Rptr. 764 (1974) (use of helicopter without warrant upheld); *Dean* v. *Superior Court*, 35 Cal.App.3d 112 (1973) (same). We conclude that while the police surveillance in this case was extensive, it did not violate any reasonable expectation of privacy which the defendants had with regard to the objects, places, and activities viewed.

A. *Helicopter Surveillance*

The defendants[7] contend, and the Government does not show otherwise, that the objects pictured in the photographs — the various vehicles parked on the grounds, the wide tracks from the barn, and the new extension built on the barn — could not be observed from any land or sea based vantage

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[7] In light of our disposition, we need not decide which of the defendants would have an expectation of privacy in the objects and places observed by the Government based on their differing interests in the property and goods. *United States* v. *Salvucci*, _____ U.S. _____, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

point outside the boundaries of the property. Although the record is equivocal, it appears further that normal cameras would not have disclosed the objects seen in the blow-ups of the photos. From these facts defendants seek to establish a legitimate expectation that these areas were to remain private.

We agree with the defendants that a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances. Given the sophistication of electronic photographic devices today, there probably are few unenclosed locations which could not be observed from some airborne location. We are not presented with an attempt to reduce, by the use of vision-enhancing devices or the incidence of aerial observation, the privacy expectation associated with the interiors of residences or other structures. *Cf. United States* v. *Taborda*, 491 F.Supp. 50 (E.D.N.Y.1980) (surveillance of defendants' living room window by means of high-powered telescope from apartment across street is search requiring compliance with fourth amendment).

[1, 2] Coast Guard helicopters routinely traversed the area near the Allen Ranch for several reasons, including law enforcement. Moreover, officer Gano already had some facts which justified a suspicion that the ranch might be used for drug smuggling. If there is some justification for concentrating a surveillance on a particular place, as opposed to random investigation to discover criminal activity, that factor is weighed in the balance and contributes to justification for the surveillance. This proposition is an appropriate implementation of our precedents in resolving the difficult question concerning when devices can be used to aid the senses to observe activity occurring in open or public places consistently with the fourth amendment. *See United States* v. *Curtis*, *supra*,

562 F.2d at 1156.[8] In addition, at least some courts have approved warrantless surveillance from helicopters. *See, e.g., People* v. *Superior Court, supra*; *Dean* v. *Superior Court, supra*. *But see People* v. *Sneed, supra*. Although the issue is not entirely free from doubt, we conclude that the defendants did not have a reasonable expectation that the extension on the barn, the presence of the vehicles, and the tracks leading from the barn would not be noticed and recorded by officers in the Coast Guard helicopter.

Several factors distinguish this case from others and reduce the ranch residents' reasonable expectation of privacy. The Allen Ranch is virtually on the United States sea-coast border, *see United States* v. *Stanley*, 545 F.2d 661, 666 n.6 (9th Cir. 1976) (en banc), *cert. denied*, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed.2d 757 (1978), and Coast Guard helicopters routinely traversed the nearby air space for several reasons, including law enforcement. The residents of the Allen Ranch would, no doubt, have been aware of these routine flights and any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well-known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sophisticated electronic equipment. As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborne telephotographic scrutiny, particularly where, as here, the objects observed were large scale modifications of the Allen Ranch landscape and barn.

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[8] We recognize that the rule we state here, and the rationale of the *Curtis* case, blur somewhat the usual fourth amendment analysis, which first distinguishes between searches and less intrusive police conduct, and then requires that the former be supported by probable cause and, except in unusual cases, by a warrant as well. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The rationale of this case and the rationale of *Curtis* do not mean that activity which is indisputably a search can be justified by less than probable cause.

B. *Seismic Sensors*

[3] Although the record is unclear on the point, placement of the seismic sensors could raise a potentially complex fourth amendment issue insofar as entry upon the Allen property and maintaining the sensors on that property in an operating condition may constitute distinct types of trespass with different fourth amendment consequences. *See, e.g., United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978); *United States* v. *Basile*, 569 F.2d 1053 (9th Cir.), *cert. denied*, 436 U.S. 920, 98 S.Ct. 2268, 56 L.Ed.2d 761 (1978); *United States* v. *Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976); *United States* v. *Capps*, 435 F.2d 637 (9th Cir. 1970). We need not resolve this question, however, because appellants have pointed to no evidence obtained by use of the sensors not already known from other sources, and therefore any fourth amendment violations are harmless error and produced no tainted evidence.

C. *Surveillance from the Hill*

[4] This circuit has held that the use of aids to the senses such as binoculars does not convert unobjectionable surveillance into a prohibited search. *See Dubrofsky, supra*, 581 F.2d at 211; *Solis, supra*, 536 F.2d at 882. Surveillance of the open fields on the ranch from the hill observation site and use of binoculars violated not reasonable expectation of privacy of the defendants.[9]

D. *Physical Intrusions*

[5, 6] The December 6 entry by Gano while accompanying the BLM officers was unobjectionable. The other officers had

[9] *United States* v. *Curtis*, 562 F.2d 1153 (9th Cir. 1977) does not require a different result.

a right to enter to discuss the possibility of granting an easement through the ranch to the federal property on the other side, and Cano did not violate the fourth amendment by concealing his identity as a Customs Bureau official. *Lewis* v. *United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *United States* v. *Glassel*, 488 F.2d 143, 145 (9th Cir. 1973). Although the treaspass by officers on the night of December 29 onto the parking lot area may present constitutional questions, *see, e.g., Wattenburg* v. *United States*, 388 F.2d 853 (9th Cir. 1968), no evidence was taken, and none appears tainted, as a result of the officers' actions. We doubt that these trespasses violated the fourth amendment, *see, e.g., Basile, supra*, 569 F.2d at 1056; *United States* v. *Williams*, 569 F.2d 823 at 826; *United States* v. *Capps*, 435 F.2d 637, 640 (9th Cir. 1970), but since no evidence resulted from the actions we need not further consider the matter. *Cf. United States* v. *Cella*, 568 F.2d 1266, 1284-86 (9th Cir. 1977); *United States* v. *Cales*, 493 F.2d 1215, 1215-16 (9th Cir. 1974) (where government investigation already focused, illegal search producing some intensification of surveillance does not taint evidence subsequently obtained if search does not direct investigation to the specific evidence sought to be suppressed).

E. *The December 30 Arrest at the Allen Ranch*

[7] The officers had probable cause to enter Allen's property and arrest the defendants on the night of December 30. They observed the offloading activities from an unlighted vessel in the middle of the night and the sound of people congratulating each other, and these facts, together with all the other information then available to them, justified a belief that a crime was being or had just been committed. It was not necessary for them to secure an arrest warrant for the arrest made on Allen's property but not in his home. *United States*

v. *Santana*, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409, 49 L.Ed. 2d 300 (1976); *United States* v. *Watson*, 423 U.S. 411, 423-24, 96 S.Ct. 820, 827-828, 46 L.Ed.2d 598 (1976).

F. *The December 30 Searches*

[8] The search of the ranch house did not violate the fourth amendment. The officers had surprised an unknown number of people suspected of importing a large quantity of drugs in the middle of the night. They were told by one arrestee that there were some men in the ranch house. The agents were not obliged to believe the arrestee's statement that the men in the house were unarmed. These facts, plus the distinct possibility of destruction of evidence or armed defendants inside the house, constitute exigent circumstances which justify the search without a warrant. *See United States* v. *Flickinger*, 573 F.2d 1349, 1355-56 (9th Cir.), *cert. denied*, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978); *United States* v. *Gaultney*, 581 F.2d 1137, 1146-48 (5th Cir. 1978). The remaining searches are either justified by one of the exceptions to the warrant requirement or constitute harmless error.

G. *The Subsequent Search Warrants*

[9] Following the arrest and searches on the night of the 30th, law officers returned to the ranch on December 31 with a search warrant authorizing a search of the residence and outbuildings of the ranch "for the narcotic drug marijuana and papers and documents relating to the trafficking of marijuana." Two more similar searches were conducted in January of 1978. Defendants challenge the warrants as defectively overbroad.

The Supreme Court has expressed concern for warrants authorizing seizure of papers and documents, *Andresen* v. *Mary-*

*land*, 427 U.S. 463, 480-83, 96 S.Ct. 2737, 2748-49, 49 L.Ed. 2d 627 (1976), but warrants with language comparable to that involved here have been upheld. *See United States* v. *Dubrofsky, supra*, 518 F.2d at 213; *United States* v. *Prewitt*, 553 F.2d 1082, 1086 (7th Cir. 1977). *See generally United States* v. *Johnson*, 541 F.2d 1311 (8th Cir. 1976). In any event, the items sought to be suppressed are two small amounts of marijuana and a receipt identifying defendant Kerr as the purchaser of the red Ford van. Both items are mejely cumulative evidence of facts proved through other evidence as well.

H. *Stopping and Boarding of Cigale*

[10] The stopping of the Cigale, the arrest of its crew, and the coincident seizure of evidence can be sustained on either of two grounds. First, as we understand the record, the Coast Guard kept contact with the ship by radar and helicopter, and the helicopter crew that ordered the ship to stop was in radio contact with ground units on the beach. If this is correct, there was probable cause to stop the ship and arrest its crew, since it was established that it had accomplished a nighttime offloading followed by actions on the beach, including flight of the suspects.

Even on the assumption, however, that Coast Guard units which stopped the Cigale and arrested its crew had not been in constant contact with the ship, or did not know all that had transpired on the beach, the furtive nighttime offloading had been established. Since the Cigale was in the area, it was proper for the Coast Guard to stop it for questioning. *United States* v. *Piner*, 608 F.2d 358, 361 (9th Cir. 1979); *United States* v. *Williams*, 589 F.2d 210, 214 (5th Cir. 1979); *United States* v. *Odneal*, 565 F.2d 598, 601 (9th Cir. 1977), *cert. denied*, 435 U.S. 952, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978). The reasonable suspicion to stop ripened into probable cause

to search and arrest when the crew of the Cigale was observed throwing boxes of cargo overboard and when the Cigale failed to respond to further communications or to stop.

I. *Arrests of Kerr, Kolander, and Allen*

[11] There was probable cause to arrest Kerr, Kolander, and Spencer Sherman. Each man was apprehended near the Allen Ranch. Kerr was apprehended while wearing a wet suit shortly after the unloading of boxes from the Cigale on amphibious vehicles. Kolander was wet and had a noticeable bulge in his pocket which provided reasonable suspicion for the officers to conduct a frisk. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 111-12, 98 S.Ct. 330, 333-34, 54 L.Ed.2d 331 (1977); *Terry* v. *Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1879-80, 20 L.Ed.2d 889 (1968). When the officers found a pair of pliers of the type used at the Allen Ranch, they had probable cause to arrest Kolander. Sherman was arrested while hitchhiking on a highway where hitchhiking was rare. He was wet and his clothes were sandy, though the weather throughout the state that day had been clear and dry. Sherman had no identification and no explanation for his presence on the highway or his appearance.

[12-14] We agree, however, that Allen's arrest was illegal. The police, of course, had probable cause to arrest Allen, but they did not know that the man they arrested was Allen until after the arrest occurred. Nevertheless, an illegal arrest is not a basis for reversing a conviction. *Frisbie* v. *Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 511, 96 L.Ed. 541 (1952). Allen contends that his conviction should be reversed because the arrest was necessary evidence of his presence at the ranch and his involvement in the crime. We disagree. The only evidence obtained from the arrest was a key taken from Allen's wallet which led the officers to Allen's safe deposit box. In the box

the officers found defendant Theriaque's certificate of ownership for his dogs and the Allen Ranch purchase agreement. This evidence was cumulative of the testimony of several of the witnesses who testified at trial and its admission does not amount to prejudicial error.

## III. Sufficiency of the Evidence

The thrust of appellants' arguments on the sufficiency of evidence is that the evidence against them is circumstantial. There is, nevertheless, more than enough evidence, direct, testimonial, and circumstantial, to establish beyond a reasonable doubt "an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose and the requisite intent necessary to commit the underlying substantive offense." *United States* v. *Oropeza*, 564 F.2d 316, 321 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978).

[15] The evidence of each appellant's role in the smuggling will be discussed briefly. Allen bought the ranch, appeared to be in charge, and was present for most of December. He alone was convicted of count II — conspiracy to import marijuana, 21 U.S.C. §§ 812, 952(a), 960, 963 (1976). Kerr arrived between December 16th and 20th, was found wearing a wet suit of the type worn by those who transferred the contraband from the Cigale to the amphibious vehicle, and was found carrying over $2,600 in cash. Derek Sherman bought the ship Cigale in Germany for over $300,000, and was the navigator from Thailand to the United States coast. Spencer Sherman, Derek's brother, traveled from the East Coast to take part in the unloading operation, arriving between December 16th and 20th. Theriaque bought the guard dogs — appropriately named Bonnie and Clyde — and was found

in a wet suit like Kerr's, indicating involvement in the transfer of contraband at sea. Diffenderfer arrived between the 16th and 20th of December as well, and was seen running from the semi-trailer during the sweep. All of these six men — Allen, Kerr, Derek Sherman, Spencer Sherman, Theriaque, and Diffenderfer — were convicted of count I, conspiracy to possess a controlled substance with intent to distribute, 21 U.S.C. §§ 812, 841(a)(1), 846, as well as count III, possession with intent to distribute, 21 U.S.C. §§ 812, 841(a)(1); 18 U.S.C. § 2.

Kolander was convicted only of possession, count III. Kolander was present at the ranch during December.

[16, 17] The appellants all offer similar arguments as to the asserted inadequacy of the evidence.[10] As to both count I, conspiracy to possess with intent to distribute, and count III, possession with intent to distribute, they reiterate that the contraband must be known by the defendants to be a controlled substance for the convictions to stand. Appellants' counsel imaginatively suggest that appellants could have thought the "sealed and odorless metal boxes" contained "silk or some other cargo." While not completely out of the realm of possibility, this suggestion is implausible enough in this context that a rationale trier of fact could have believed it false beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 324-26, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979) (due process standard of review on habeas petition). The appellants' attack on sufficiency of evidence concerning intent to distribute is similarly baseless: personal consumption of 17,000 pounds of anything, much less marijuana, is a staggering proposition sufficient to compel disbelief, leaving commercial distribution as the only realistic goal of the enterprise. There is testimony

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[10] Although we view the reasoning set out above as adequate by itself to establish the sufficiency of the evidence, we also accept and adopt the evidentiary arguments made by the Government with respect to each defendant.

that the fee for unloading this cargo — the work of a few hours — was $10,000. The scale of the undertaking, and its secrecy, indicate that no one would have been admitted to the enterprise who was not to be trusted completely with knowledge of its criminal character. *See United States* v. *Pentado*, 463 F.2d 355, 362-63 (5th Cir.), *cert. denied*, 409 U.S. 1079, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972).

[18, 19] Appellants also raise several times the argument that they had insufficient dominion and control to be convicted of possession. This argument is irrelevant. They do not even contest the government's assertion that they aided and abetted criminal possession, and it is a fundamental principle of federal criminal law that one who aids and abets is punishable as a principal. 18 U.S.C. § 2 (1976). Count III of the indictment specifically alleged violation of 18 U.S.C. § 2, and the court's judgments of count III violations read "in violation of Title 21 U.S.C. Section 841(a)(1) and Section 846 *as charged in Count 3 of the indictment.*" Record at 1248A (emphasis added). In other words, defendants-appellants' argument that "[a]lthough defendants were charged with aiding and abetting, the judgments reflect that they were convicted of possession in violation of 21 U.S.C. § 841" rests on an ultratechnical assertion that the judgment cannot validly incorporate 18 U.S.C. § 2 by explicit reference to the indictment in which the aiding and abetting violation was specifically charged. The argument is without merit.

## IV. Assignment, Trial, and Sentencing Proceeding

The procedural history of this case requires brief review. Two judges from districts outside Oregon were to split the pretrial and trial portions of the case, sitting in Oregon by designation. Judge Tanner was assigned the former, Judge Fitz-

gerald the latter. Upon Judge Fitzgerald's indisposition, Judge Conti of the Northern District of California was designated. Defendants moved to change venue because of publicity. The motion was granted, and the trial was moved to the Northern District of California. Either to promote economy of time and of effort, or because of Judge Conti's familiarity with the case, Judge Conti was reassigned to the trial by Chief Judges Browning and Peckham.

[20] During sentencing of the third defendant to be sentenced, Maggiacomo, Judge Conti said that importing marijuana was a very serious crime that had a "cancer"-like effect on society. Presumably this is but an innocuous and unexceptionable paraphrase of congressional sentiment in passing the criminal statutes in question. Nevertheless, Judge Conti's statement inspired counsel for the fourth, seventh, and eighth defendants to be sentenced (Kerr, Spencer Sherman, and Theriaque) to move that Judge Conti recuse himself because of prejudice. This sequence of events prompts three arguments, each largely empty. First, appellants complain of the irregularity of Judge Conti's assignment to the case. They have no basis, however, to advance as error any alleged violation of the Northern District of California's Random Assignment Plan unless they can show actual prejudice. *United States* v. *Radlick*, 581 F.2d 225, 230 (9th Cir. 1978); *United States* v. *Torbert*, 496 F.2d 154, 156-57 (9th Cir.), *cert. denied*, 419 U.S. 857, 95 S.Ct. 105, 42 L.Ed.2d 91 (1974). As the remaining discussion will indicate, they did not show this; we need not therefore decide the question of conformity with the Assignment Plan.

The prejudice issue entails the two other complaints, first, that Judge Conti's remarks on the danger of marijuana reveal an impermissible appearance of partiality, *see* 28 U.S.C. § 455(a), and second, that Judge Conti evinced an impermissibly fixed or mechanical view of sentencing.

[21] As to the first, Judge Conti's unexceptionable restatement of a congressional purpose comes nowhere near the sort of apparent ethnic, political, or personal animus at stake in the cases appellants cite to support their point. *See, e.g., Berger* v. *United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1931) (German Americans); *Connelly* v. *United States District Court*, 191 F.2d 692 (9th Cir. 1951) (Communists). Neither the source nor the content of Judge Conti's views on marijuana smuggling indicate that recusal would have been proper. *See United States* v. *Sibla*, 624 F.2d 864 (9th Cir. 1980) (as amended, April 28, 1980).

[22] The fixed or mechanical sentencing claim is answered simply by pointing out that the sentences imposed here varied from five to six to eight to ten years in the aggregate, and from two to three to four to five years in respect to the same offense, count III, with correspondingly varied parole terms for each defendant. The sentences were all within the statute's prescription. The fixed view cases cited by appellants generally are so extreme as to be irrelevant here. In one, the judge sentenced all draft evaders to thirty months as a matter of policy. *United States* v. *Thompson*, 483 F.2d 527, 528 (3d Cir.), *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1973). Appellants' reliance on *United States* v. *Wardlaw*, 576 F.2d 932, 936-38 (1st cir. 1978), is similarly misplaced, in that there is here no showing that the court's sole motive in imposing the sentence was a general deterrence objective unrelated to the conduct of the defendants actually before the court.

AFFIRMED.

## Appendix B.

### United States Court of Appeals for the Ninth Circuit

Filed
Apr. 16 1981
Richard H. Deane
Clerk, U.S. Court of Appeals

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| UNITED STATES OF AMERICA, | ) | |
| PLAINTIFF-APPELLEE | ) | Nos. |
| vs. | ) | 79-1059 |
| ARTHUR ANDREW ALLEN, | ) | 79-1060 |
| PETER A. DIFFENDERFER, KEVIN T. | ) | 79-1063 |
| KERR, DEREK S. SHERMAN, | ) | 79-1064 |
| SPENCER C. SHERMAN, AND | ) | 79-1065 |
| GARY L. THERIAQUE, | ) | 79-1066 |
| DEFENDANTS-APPELLANTS. | ) | 79-1067 |
| | | ORDER |

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Before: KENNEDY, TANG, AND ALARCON, Circuit Judges.

The panel votes unanimously to deny the petition for rehearing. A majority of active judges not being in favor of taking the case en banc, the en banc suggestion is rejected.

The opinion is amended as follows:

1. 633 F.2d at 1286, replace third full paragraph with: "On November 6, 1977, the United States Customs Bureau opened an office in Coos Bay. The officer in charge, Larry Gano, almost immediately became aware of complaints from local residents who had been refused permission to cross the Allen Ranch. A check on Allen's background led Gano to suspect that the ranch might be a drug-smuggling base. On Decem-

ber 5, 1977, Gano accompanied members of the Coast Guard on a helicopter flight past the ranch. According to the Government, the Coast Guard routinely flew over or near private property on the Oregon coast for training flights and other purposes, including law enforcement. Although the pilot's testimony at the suppression hearing strongly suggests that the helicopter avoided Allen's airspace, this was not unequivocally established. Using a telephoto lens, Gano took photographs of the ranch property. The photos revealed unusually wide tire tracks leading to and from a barn and a new extension built on the barn."

2. 633 F.2d at 1289, replace first full paragraph with: "The defendants[7] contend, and the Government does not show otherwise, that the objects pictured in the photographs — the various vehicles parked on the grounds, the wide tracks from the barn, and the new extension built on the barn — could not be observed from any land or sea based vantage point outside the boundaries of the property. It appears further that a lens of normal focal length would not have disclosed the objects seen in the blow-ups of the photos: the camera used was a 35 mm. format equipped with a 70-230 mm. zoom lense instead of the standard 50 mm. lens. Such equipment is widely available commercially and is not more sophisticated than lenses generally available to the public. From these facts defendants seek to establish a legitimate expectation that these areas were to remain private."

3. 633 F.2d at 1290, replace second full paragraph with: "Several factors distinguish this case from others and reduce the ranch residents' reasonable expectation of privacy. The Allen Ranch is virtually on the United States sea-coast border, *see United States* v. *Stanley*, 545 F.2d 661, 666 n.6 (9th Cir. 1976) (en banc), *cert. denied*, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed.2d 757 (1978), and Coast Goard helicopters routinely traversed the nearby airspace for several reasons, including

law enforcement. The residents of the Allen Ranch would, no doubt, have been aware of these routine flights and any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well-known function of seacoast patrol and surveillance, could expect that government officers conducting such flights would be aided by sense-enhancing devices. As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborn scrutiny of the objects observed here, large scale modifications of the Allen Ranch landscape and barn."